IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO(WCA) No.442 of 2006 alongwith Cross Objection No.428 of 2006
Date of Decision: 22.3.2011

Dwarku Devi & ors.

.....Appellants

VERSUS

Union of India & ors.

.....Respondents

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting? Yes

For the Appellants: Mr.Suneet Goel, Advocate.

For the Respondents: Mr.J.L.Kashyap, Advocate.

Deepak Gupta,Judge (Oral)

The aforesaid appeal and cross objections are being disposed of by this common judgment since they arise out of one award of the Commissioner, Workmen's Compensation.

The first question which has to be decided is with regard to the maintainability of the Cross Objections. The Cross Objections have not been admitted and on 21.12.2006, the then Chief

Justice while permitting the Cross Objections to be placed on record did not pass any order formally admitting the same since Sh.Suneet Goel, learned counsel for the appellant had raised an objection to the maintainability of the Cross Objections.

Sh.J.L.Kashyap, learned counsel for the Cross-Objector relies upon the judgment of a learned Single Judge of the Allahabad High Court in ***Moti Lal Vs. Thakur Dass, 1985, ACJ 634*** in support of his contention that Cross Objections are maintainable in an appeal under Section 30 of the Workmen's Compensation Act, 1923.

It would be pertinent to mention that this judgment by a learned Single Judge of the Allahabad High Court is based on a Full Bench judgment of the said Court in U.P State Road Transport Corporation Vs. Janki Devi, 1982 ACJ 429 which took the view that Cross Objections as contemplated under Order 41 Rule 22, CPC are maintainable in an appeal under Section 110-D of the Motor Vehicles Act, 1939.

However, as far as this Court is concerned, in ***Miss Lata Vs. United India Insurance***

Company Ltd. & Ors. Cross-objection No.39 of 1996 in FAO No.267 of 1993, this Court specifically held that unless the Rules or the Acts specifically provide for applicability of the particular provisions of the Code of Civil Procedure, the specific provisions of CPC were not applicable and hence Cross Objections were held to be not maintainable in an appeal filed under the Motor Vehicles Act.

As far as the Workmen's Compensation Act, 1923 is concerned, Section 23 thereof reads as follows:-

> **"23.Powers and Procedure of Commissioners.**- The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence on oath (which such Commissioner is hereby empowered to impose) and of enforcing the attendance of witnesses and compelling the production of documents and material objects, [and the Commissioner shall be deemed to be a Civil Court for all the purposes of [Section 195 and of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974]]."

This Section only relates to the powers and procedure of the Commissioner and has invested the Commissioners appointed under the

Act with the powers of a Civil Court for the purpose of taking evidence on oath and for enforcing the attendance of witnesses, compelling the production of documents etc. The powers vested in the Commissioner have no concern with the appellate powers nor do they in any manner indicate that it was the intention of the legislature that Order 41 Rule 22 would be applicable in appeals filed under Section 30 of the Workmen's Compensation Act.

It would also be pertinent to mention that Section 30 of the Act provides that an appeal shall lie to the High Court from certain orders of the Commissioner but the first proviso to this appeal lays down that no appeal shall lie against any order unless a substantial question of law is involved in the same. The third proviso lays down that no appeal by an employer under Clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate to the effect that the employer has deposited the entire amount of compensation with interest. This clearly indicates that the legislature was limiting the powers of appeal under the

Workmen's Compensation Act. Appeals would lie only when a substantial question of law is involved and when certain conditions have been fulfilled. As far as the procedure for appeal is concerned, the Act, in question, is totally silent.

However, Rule 41 of the Workmen's Compensation Rules, 1924 reads as follows:-

> **"41.Certain provisions of Code of Civil Procedure, 1908 to apply.-** Save as otherwise expressly provided in the Act or these Rules the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVII and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, insofar as they may be applicable thereto:
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> Provided that-
>
> (a) for the purpose of facilitating the application of the said provisions the Commissioner may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him;
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> (b) the Commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced."

A perusal of the aforesaid Rule clearly shows that the rule making authority decided that certain provisions of Order V, Order IX, Order XIII, Order XVI, Order XVII and Order XXIII would apply to the proceedings before the Commissioners. Again this does not in any manner indicate that other than the sections of the Code of Civil Procedure specifically referred to, any other provision of the Code of Civil Procedure was made applicable. Therefore, there is nothing to show that the Code of Civil Procedure would apply to such cases.

In view of the above discussion, I am of the considered view that the Cross Objections are not maintainable in an appeal filed under the Workmen's Compensation Act, 1923 and the same are rejected as being not maintainable.

Now coming to the appeal filed by the workman. The only question is whether the workman is entitled to penalty and interest. Since the Cross Objections filed by the employer have been rejected, the findings of the learned Courts below that the workman died during the course of duty are accepted to be correct. Admittedly, the

workman suffered an injury on 21.11.2002. He died on 29.11.2002 and the Claim Petition was filed on 30.6.2003.

Section 4-A of the Workmen's Compensation Act, 1923 reads as follows:-

> **"4A. Compensation to be paid when due and penalty for default.-**(1) Compensation under section 4 shall be paid as soon as it falls due.
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> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
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> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner may direct that in addition to the amount of the arrears, simple interest at the rate of six per cent per annum on the amount due together with, if in the opinion of the Commissioner there is no justification for the delay, a further sum not exceeding fifty per cent of such amount, be recovered from the employer by way of penalty."

The Apex Court in ***Pratap Narain Singh Deo Vs. Shrinivas Sabata and another, AIR 1976 SC***

222 dealt with this provision. The Apex Court was dealing with a case where the Commissioner had ordered the payment of penalty to the extent of fifty per cent together with interest at the rate of 6% per annum on the amount of compensation awarded by him. One of the questions raised for consideration on behalf of the employer-appellant in that case was whether the Commissioner had committed an error of law in imposing the penalty under Section 4-A (3) in view of the fact that the compensation had not fallen due until it was settled by the Commissioner under Section 19 by the award there impugned. The submission was considered and rejected in the following words:-

> "Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if 'personal injury is caused to a workman by accident arising out of and in the course of his employment.' It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay

the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

It was the duty of the appellant, under Section 4-A (1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal

> approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner, for settling the claim, and even there, the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

The aforesaid judgment sof the Apex Court was followed in ***Ram Dulari Kalia Vs. H.P State Electricity Board and another, ILR 1986(15) 842.***

It is thus apparent that compensation falls due immediately within one month of the injury or death as the case may be. It is the duty of the employer to pay compensation and if the employer fails to deposit the compensation, he is bound to pay interest. Therefore, the respondents are held liable to pay interest on the amount of compensation @ 12% per annum from 29.12.2002,

i.e., one month after the date of death till the deposit of the amount.

Coming to the question of penalty. I am of the view that this is not a fit case for award of penalty. The defence taken by the employer that the deceased had not died during the course of duty cannot be said to be a frivolous defence. Admittedly, this was a case where nobody had seen the workman sustaining the injury. He had died by fall from the retaining wall. Therefore, no case is made out for award of penalty.

In view of the above discussion, the appeal is allowed to the limited extent as indicated above and the respondents are held liable to pay interest @ 12% per annum on the amount of compensation w.e.f. 29.12.2002, i.e., one month after the date of death till the payment of the amount. Cross Objections are rejected as not being maintainable. No order as to costs.

March 22, 2011 **(Deepak Gupta)**
(m) **Judge.**